In the Supreme Court of the United States

October Term, 1976

NO. 75-6527

JAMES INGRAHAM, by his mother and next friend, ELOISE INGRAHAM, and ROOSEVELT ANDREWS, by his father and next friend, WILLIE EVERETT,
Petitioners,

vs.

WILLIE J. WRIGHT, I; LEMMIE DELIFORD; SOLOMON BARNES; EDWARD L. WHIGHAM; and THE DADE COUNTY SCHOOL BOARD,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE UNITED TEACHERS OF DADE, LOCAL 1974, AFT, AFL-CIO, AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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CONSENT TO FILING

This amicus brief is filed, pursuant to Supreme Court Rule 42(2), with the written consent of all parties to the case.

INTEREST OF AMICUS CURIAE

THE UNITED TEACHERS OF DADE, LOCAL 1974, AFT, AFL-CIO, ("UTD"), is an unincorporated labor organization which serves as the exclusive bargaining representative for 17,000 employees of the DADE COUNTY SCHOOL BOARD, Respondent herein. The majority of UTD's members are in fact classroom instructional personnel. The UTD was organized to:

> "obtain and protect for all teachers and non-supervisory school employees all of the rights to which they are entitled in a free society;
>
> create a positive and realistic image of teachers in the eyes of the public;
>
> encourage and promote teacher involvement in community affairs;
>
> promote the welfare of the children of Dade County by providing progressively better educational opportunities for all;
>
> promote mutual assistance and cooperation of Dade County by providing progressively better educational opportunities for all."

[UTD Constitution Article III, Objectives, §§2,7,8,10,11.]

The UTD submits this Brief in the belief that the *en banc* decision of the United States Court of Appeals for the Fifth Circuit should be affirmed because its construction of the Constitutional precepts involved is correct as they apply to the common practice of corporal punishment in public schools of America. The teachers who constitute the members of amicus are firmly committed to the concepts that underpin the decision of the Court of Appeals below, since it was that Court's holding that corporal punishment is a valid disciplinary alternative for use in the schools and its utilization cannot create a Constitutionally recognizable tort. The terrifying growth of violence and fear in the public schools has come at a time when there are fewer and fewer societal resources being applied to the teaching of self-restraint and personal discipline. Amicus teachers stand on the frontlines in what all too often is the battleground of public education. Their interest in the Court's consideration of the case at bar is both obvious and paramount.

ISSUES PRESENTED FOR REVIEW

I

WHETHER THE CRUEL AND UNUSUAL PUNISHMENTS CLAUSE OF THE EIGHTH AMENDMENT IS APPLICABLE TO THE ADMINISTRATION OF DISCIPLINE THROUGH [SEVERE] [OR ANY] CORPORAL PUNISHMENT IMPOSED BY PUBLIC SCHOOL TEACHERS AND ADMINISTRATORS UPON PUBLIC SCHOOL CHILDREN?

II

DOES THE INFLICTION OF ANY CORPORAL PUNISHMENT UPON PUBLIC SCHOOL STUDENTS, ABSENT NOTICE OF THE CHARGES FOR WHICH PUNISHMENT IS TO BE INFLICTED AND AN OPPORTUNITY TO BE HEARD, VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT?

STATEMENT OF THE CASE

The UNITED TEACHERS OF DADE rely upon and incorporate by reference herein, the Statement of the Case set forth in the Brief for Respondents.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Eighth Amendment to the United States Constitution:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the United States Constitution (in pertinent part):

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. §1983:

> "Every person who, under color of any statute, ordinance, regulation, custom, or useage, of any State or Territory, subjects or causes to be subjected any person of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

The Brief of the Respondents sets out in full both the old and the new statutes in Florida relating to corporal punishment in the public schools. These laws include Florida Statutes §232.27, §228.041, §230.23, §232.27, §232.275. These statutes are set forth in full on pages 2 through 5 of Respondents' Brief. In addition, the DADE COUNTY SCHOOL BOARD policy on corporal punishment with its revisions and implementing guidelines is reproduced in the Appendix at pages 125-132.

SUMMARY OF ARGUMENT

I

THE EIGHTH AMENDMENT HAS BEEN AND IS NOW LIMITED TO PUNISHMENTS ANNEXED TO CRIMES, AND SHOULD NOT BE EXTENDED TO CORPORAL DISCIPLINE IN PUBLIC SCHOOLS.

In *Paul v. Davis*, __ U.S. __, 96 S.Ct. 1155, 1160 (1976), this Court emphatically rejected the expansion that many of us had sought in the injuries encompassed under 42 U.S.C. §1983, eliminating reinterpretation of the Civil Rights Statute as constituting "a body of general federal tort law." *See also Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973); Prosser, *Torts*, §9 (4th Ed. 1971). Thus, the starting ground is whether or not there is a deprivation of a Constitutional right — not whether there was a wrongdoing in a specific instance that might inspire individual remedy. This Court has repeatedly told the educational community that it will not enter the schoolhouse door unless and until a Constitutional breach occurs. The Eighth Amendment has not been in the past, nor is it being in the present — save two instances lacking in analytical and logical depth — applied to create a federal cause of action for incidents of discipline in public schools, rather than incidents which arise in the context of the criminal justice system.

The Court of Appeals for the Fifth Circuit quite properly held that the Constitution's cruel and unusual punishment clause is restricted to the criminal law context. Interestingly enough, the trial court which was much more

generous to the plaintiffs in allowing a clear possibility that corporal punishment within a school might in fact rise to a level that would invoke the Eighth Amendment's protection, still concluded that:

> "The undisputed facts regarding Ingraham and Andrews cannot demonstrate the elements of severity, arbitrary infliction, unacceptability in terms of contemporary standards, or gross disproportion which are necessary to bring 'punishment' to the Constitutional level of 'cruel and unusual punishment'." *Appendix*, 148-149.

So using the standard urged by Petitioners, the specifics of their case failed to convince the trier of facts who dismissed their cause at the end of the Plaintiff-Petitioners' presentation of evidence.

II

ROUTINE CORPORAL DISCIPLINE IN PUBLIC SCHOOLS DISTURBS NO BASIC CONSTITUTIONAL INTEREST OF THE STUDENT AND THUS PROVOKES NO REQUIRED DUE PROCESS PROCEDURES.

Petitioners took the case of *Goss v. Lopez*, 419 U.S. 565 (1975) and ran unswervingly in the direction predicted by Mr. Justice Powell in his dissent to that decision. The Court of Appeals distinguished between the due process clause's requirement for a prior hearing in *Goss* and Petitioners' insistence on notice and a hearing to a student prior to the imposition of corporal discipline in the public

schools. The distinction found its base on the lack in *Ingraham* of a liberty or property interest sufficient to bring the Fourteenth Amendment into play.

With public employees such as the teacher members of amicus UTD still experiencing the shock waves of this Court's very recent decision in *Bishop v. Wood*, ____ U.S. ____, 96 S.Ct. 2074 (1976), expansion of the Fourteenth Amendment's hearing mechanism protections to the interest asserted by Petitioners is neither appropriate nor consistent with most recent pronouncements of this body. *Goss* had found a property interest (education) in the statutes of Ohio—in Florida, not only is there no statutorily created right to be free of bodily discomfort visited on a student during corporal discipline, there is specific statutory recognition that such action is acceptable.

The introduction of a neutral arbiter and dispenser of corporal discipline into public schools is neither desirable nor Constitutionally called for. It would in fact introduce a foreign element into the traditional context of school discipline in such a manner as to undercut the authority of the very persons held responsible under state law for maintaining classroom decorum and order. Due process does not dictate such an innovation and common sense rejects its legal and practical value.

ARGUMENT

INTRODUCTION

Both in the phrasing of their issues and in the major topic headings of their Brief, Petitioners have sought to distinguish routine corporal discipline from severe corporal

punishment. However, once they begin to define their terms, the distinctions melt into a warm puddle of obscurity. *E.g.*, Petitioners' Brief at p. 31, p. 44:

> "The definition of 'severe' is drawn from the facts of this case. It means the repeated and continued infliction of bodily pain by an instrument designed to cause such pain."
>
> . . .
>
> "In the due process sense, 'severe' corporal punishment means the infliction of bodily pain by an instrument designed to cause such pain. That definition is drawn from the facts of this case. We do not include a brief hand spanking or a slapped face within the definition of 'severe' corporal punishment. But one 'lick' with a paddle, an instrument designed for the purpose of causing pain, is 'a severe though brief intrusion upon cherished personal security.' "

Petitioners contend that they are seeking only Constitutional protections for the infliction of "severe corporal punishment"—and then they define their terms, based on no authority or precedent, in such a manner that any classroom teacher (in fact, any Constitutional scholar) would be in doubt as to when, if ever, corporal discipline would *not* be "severe."

Any doubt that there was a reality to this surface distinction is eliminated by studying the testimony introduced at trial and the underlying theme of Petitioners' Brief. Starting on page 35 of their Brief and running through page 40, the implications become explicit. The Court is told that the difficulty inherent in tolerating *any* corporal pun-

ishment is addressed in *Jackson v. Bishop*, 404 F.2d 571 (8th Cir. 1968), the infamous Arkansas Prison strap case. After reciting the *Jackson* court's finding that excessive whipping or too great frequency of whipping or use of studded or over-long straps constituted cruel and unusual punishment, they end their *Jackson* quotation with the question: "But if whipping were to be authorized, how does one, or any court, ascertain the point which would distinguish the permissible from that which is cruel and unusual?" Then the Petitioners finally come out of the closet:

> "These arguments strongly support a *total ban on corporal punishment* as the only effective way of insuring Eighth Amendment protections. See also 6Harv.Civ. Rights-Civ.Lib.L.Rev., *Corporal Punishment In The Public Schools*, 583, 585 (1971):
>
> 'While theoretically corporal punishment need not be brutal, there is no assurance that it will be inflicted moderately or responsibly. In the heat of anger, especially if provoked by personal abuse, some teachers are likely to exceed legal bounds. Moreover, if limited corporal punishment were permitted, controls would be unlikely to prevent the "really unmistakable kind of satisfaction which some teachers feel in applying the rattan."[19] A total ban of this punishment would provide far more effective control.[20]'
>
> [Petitioners' Brief at 36-37.]

[19]J. Kozol, *Dead at an Early Age*, 16-17 (1967).

[20]A rule forbidding all corporal punishment would probably receive more compliance than the common law principles because all parties involved are more likely to be aware of it and conscious of any violation. This would likely be reinforced by the added case of convicting a violator, simply by holding the school official involved in contempt of a court order, where injunctive relief is obtained.

The "authorities" from whom Petitioners derive their "intellectual" support—the psychologists and the National Education Association "Task Force Report on Corporal Punishment," all come down vehemently and unambiguously against the use of *any* corporal discipline in the schools. *See*, Petitioners' Brief at 40.

Amicus UTD will thus not artificially put its teacher members into the rather absurd role of risking Constitutional liability on a decision as to whether the discipline they wish to apply is "severe" or somehow "regular." The Petitioners are in fact seeking abolition of corporal punishment in the schools. That is the argument to which amicus wishes to respond.

I

THE EIGHTH AMENDMENT DOES NOT PRECLUDE CORPORAL PUNISHMENT IN PUBLIC SCHOOLS.

A. The Imposition of Corporal Discipline In Public Schools is Not "Punishment" Within the Scope of the Cruel and Unusual Punishment Clause.

Amicus UTD wishes to rely upon and incorporate by reference the excellent historical tracing of the cruel and unusual punishment clause contained in the Brief of the Respondents, pp. 18-22 and the similar treatment of the matter found in the Brief of National School Board Association as amicus curiae.

Amicus UTD would merely reiterate that the unadorned clarity of the Eighth Amendment speaks for itself. That Amendment provides simply that: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Without esoteric reasoning or resort to mental subterfuge, only a single meaning attaches to the three prohibitions contained in the Eighth Amendment—that is, that these three matters would be found intolerable in the criminal justice system of the new nation as they had been found to be in the home country. (The exact language of the Eighth Amendment being lifted directly from the English Bill of Rights of 1689.)

B. Controlling Judicial Interpretation Has Consistently Limited the Scope of the Clause to Punishments Inflicted Concurrent With, as a Result of or Subsequent to the Criminal Process; The Expansion of the Application of the Eighth Amendment Has Been Limited to Punishments Annexed to the Criminal Process.

The Brief of the Respondents and amicus National School Board Association follow the careful study of precedent contained in the *en banc* decision of the Fifth Circuit of Appeals in this cause. After studying all of the precedents, the Court held:

> "We do not find prisons and public schools to be analogous in the context of Eighth Amendment coverage. As discussed, *supra*, the function of the Eighth Amendment's prohibition against cruel and unusual punishments was intended to prevent the imposition of unduly harsh penalties for crim-

> inal conduct. It is not an unreasonable interpretation of the Eighth Amendment to include within its coverage discipline imposed upon persons incarcerated for criminal conduct, since such discipline is part of the total punishment to which the individual is being subjected for his crime and, as such, is a proper subject for Eighth Amendment scrutiny. To extend the *Jackson* case from a prison context to a public school situation would, however, distort the intended scope of the Amendment."
>
> [*Ingraham v. Wright*, 525 F.2d 909, 914-15 (5th Cir. 1976) *(en banc)*.]

C. Extension of the Eighth Amendment to School Discipline is Neither Precedentally Consistent Nor Constitutionally Desirable.

Surely no Circuit more than the Fifth Circuit has enthusiastically bounded in where angels fear to tread if heavenly creatures are in fact phobic regarding public institutions of education. Yet in this instance, the Fifth Circuit resoundingly rejected new inroads into school autonomy.

In *Milliken v. Bradley*, — U S. — (1974), (dissent, White), it was stated:

> "[B]ut the courts must keep in mind that they are dealing with the process of *educating* the young, including the very young. The task is not to devise a system of pains and penalties to punish Constitutional violations brought to light."

And, again in the school context, the majority in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971) said much the same thing:

> "In seeking to define even in broad and general terms how far this remedial power extends, it is important to remember that judicial powers may be exercised only on the basis of a Constitutional violation. Remedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary. Judicial authority enters only where local authority defaults."

In the desegregation cases of the last quarter century, we were repeatedly told that the schools were designed to educate and that only the grossest of Constitutional deprivations had caused the courts to interpose themselves in the educational process. Those cases seem very—and, though the pun may be painful, the point is legitimate—black and white in comparison to the present Petitioners' requests.

Having experienced and even acted as a major catalyst in bringing about the integration of the Dade County schools the UNITED TEACHERS OF DADE wish to offer some of the hard-learned lessons of the desegregation years in the context of the present disciplinary crisis in the schools. With integration, we saw society pushing the public schools to do that which society itself was unwilling to do — that is, alter the American people's actual behavior in the race relations field so as to achieve true equality of the races. Painfully, teachers and school children became pawns in a master chess game of what should have been societal revamping and what proved instead to be, in many

instances, limited restructuring of single institutions with some inevitable overflow to other areas. Society chose to make its morally and legally commanded gestures towards equality in as narrow a field as possible, focusing more and more as the years went by on the public schools. Teachers saw their dedication to educational equality undercut on every side by the vacuum in which the schools existed with no societal endorsement of complete desegregation nor the practical means of achieving it. The lack of commitment on the outside world to the inspiring achievements of the educational cloister, has brought incredible pressures, confusion and unrealistic goals to the teaching profession.

In seeking to prohibit corporal discipline in the schools under the guise of an amazingly expanded Eighth Amendment concept, teachers find themselves once more facing the possibility of a solitary experimental effort without societal support. Study after study, newspaper expose' after newspaper expose', Presidential Commission Report and Ph.D. thesis and community bi-racial committee recommendation alike — have all found a lack of parental guidance in today's society, a lack of community commitment to and involvement in the increasingly undisciplined youth of America. There is an expanding expectation on the part of the community for the school system to accept full responsibility for all social ills. This expectation emerges at the same time that we find reduced school funding which results in the elimination of many school programs designed to bring about changes in student behavior and in ever-larger class size of instructional units. With an increase in crime at all levels, there is still shocking dismay at the statistics on school violence.

A Senate Subcommittee recently released a preliminary *report showing approximately 70,000 serious physical assaults on teachers each year*, literally hundreds of thousands of assaults on students, including more than 100 students murdered in 1973 in only the 757 school districts surveyed, and confiscation of 250 weapons in one urban school district in one year. ["Our Nation's Schools — A Report Card: 'A' in School Violence and Vandalism," Preliminary Report of the Subcommittee to Investigate Juvenile Delinquency, by Senator Birch Bayh, Chairman, to the Committee on the Judiciary of the United States Senate (April 9, 1975).]

> McClung, "Alternatives to Disciplinary Exclusion From School", 20 Inequality In Education 58, 60, 71 (1975).

Clearly, both the governmental entities and familial units must be motivated to provide an atmosphere in which discipline is not a term of art that has no realistic chance for achievement. The pragmatic limits of what can be accomplished by the school system acting in isolation are starkly clear to the teachers. Corporal discipline is not an educator's natural inclination and is a tool of last resort. But the schools which the Dade County Grand Jury found to contain "no certainty of punishment existing for youngsters who break the law at school," are schools in which the courts owe the educators the right to choose from the full array of traditional disciplinary methods. Dade County, the sixth largest system in the Country, is experiencing — perhaps in lesser form — the same "combat conditions" of many urban schools. The teachers and administrators must have the ability to utilize the full panoply of disciplinary methods in working to achieve a safe educational atmosphere.

The statistics in Dade County read much like the National statistics:

> Assaults on teachers and other school personnel, 235 this year, 201 the year before (up 17%).
>
> Assaults on students, 761 this year, 841 a year ago (down only 7%).
>
> Break-ins, up 12%, from 1,632 to 1,830.
>
> Vandalism, virtually the same, 1,203 this year, 1,214 last year (but damages up by several thousand dollars).
>
> Personnel under investigation by the security department, up about 44%, from 61 to 88.
>
> Drug offenses, including drinking, down about 25%, from 169 to 131.
>
> Carrying or using weapons, down by ⅓, from 72 cases to 46.
>
> Trespassing, up 14%, from 32[illegible]o 373.
>
> Sex offenses, up 44%, from 32 to 46.
>
> Disorderly conduct, up from 95 to 244 (almost 160% jump, mainly attributable to change in classifying simple assault that might include fights between two students or verbal insults). The largest single category each year has been larcenies — about 2,200 incidents reported each

> year. About 2,000 other reports each year involved burglar alarms that sounded, but for which investigation failed to produce a cause or evidence of a break-in.
>
> [Berger, "Violence in Schools Unabated," *Miami News*, June 21, 1976.]

With the numbers painting only a small portion of the picture, recent headlines regarding the disruption of learning and the frustration of teachers and students in the schools is not surprising. Miami and Dade County's experiences are not unique. As Mr. Justice Powell said in his dissent in *Goss*, 419 U.S. at 591-592:

> "[I]t is common knowledge that maintaining order and reasonable decorum in school buildings and classrooms is a major educational problem which has increased significantly in magnitude in recent years."

Petitioners have paraded their aberrations in the disciplinary system before a Federal Judge who accepted their Constitutional arguments that the Eighth Amendment could in fact be applied to use of corporal punishment as a disciplinary measure in public schools. That trial Judge, Judge Joe Eaton, could find no deprivation of Constitutional proportions in the Plaintiffs' evidence. And, of course, Plaintiffs were utilizing the most extreme examples that could be found within the County. *Amicus UTD does not condone abuse of corporal discipline.* If and when such abuse occurs, the state courts have shown no

reluctance to offer a full and adequate remedy. This is not stated ignorant of the existence of *Monroe v. Pape*, 365 U.S. 167 (1941). It is stated solely as reassurance to the Court that since no Constitutional interest is invoked, there is in fact still a remedial avenue available for truly excessive corporal punishment.

The Legislature of Florida has authorized the teacher to "keep good order in the classroom and in other places in which he is assigned to be in charge of students." The new statute, passed this term to deal with the very disciplinary crisis discussed above, speaks specifically of corporal punishment and indicates that except in cases of excessive force or cruel and unusual punishment, a teacher or other member of the instructional staff, a principal of his designated representative, or a bus driver, shall not be civilly or criminally liable for any action carried out in conformity with state board and district school board rules regarding the control, discipline, suspension and expulsion of students. *Florida Statutes* §232.275. The school boards have in fact been specifically denied the ability to prohibit the use of corporal punishment in their district. *Florida Statutes* §230.23(c). Apodictically, corporal punishment is endorsed by the Legislature of Florida as an acceptable means of achieving discipline and a teacher or principal stands liable should he abuse that acceptable tool by excessive or cruel and unusual punishment.

The emphasis on "punishment" in the Eighth Amendment arguments creates an atypical situation unreflective of the classroom norm. Teachers are not called to their profession as quasi-correctional personnel. Teachers are there to teach. In order to achieve just that — the teaching of the students who are there to learn, teachers have had

to become disciplinarians by necessity. Corporal punishment is one method which teachers occasionally utilize in an effort to make the classroom a place where students can learn rather than merely endure. The "punishers" are, in fact, merely educators trying to protect the right to learn for those students who utilize the public school system for its most obvious function.

The Fifth Circuit, in its *en banc* decision, gave a thoughtful, careful analysis to the legal precedents and historical context of the Eighth Amendment's application. It was correct in its decision that the Eighth Amendment need not Constitutionally be extended into the classroom.

II

CONSTITUTIONAL DUE PROCESS PROCEDURES PRIOR TO ANY USE OF CORPORAL DISCIPLINE IN PUBLIC SCHOOLS ARE NOT THEORETICALLY REQUIRED NOR WORKABLE IN PRACTICE.

As amicus illustrated in its introduction to this argument, Petitioners have in effect told us in one breath that their argument should be limited to "severe corporal punishment" and, in the other breath, defined that phrase so as to encompass almost all forms of physical discipline. The exclusion of the striking of hands or slapping of faces is inconsistent and a bit incredible. In the famous scene in *Gone With The Wind*, when Scarlett slaps Rhett's face, the shock was absolute. You caught your breath! The distinction between the laying on of hands and the utilization of a paddle is so obscure as to satisfy none save the most modern of poets. It will not serve as a standard for a more prosaic court of law.

In their first argument, Petitioners ostensibly were only asking for a Constitutional prohibition against "severe corporal punishment." However, in a footnote, they explained to any of us who might be too obtuse to have picked it up by ourselves, that it would be terribly difficult to establish exactly when a punishment was severe; so, in fact, the only truly effective prohibition would be an across-the-board elimination of corporal punishment. Then, in their second argumentive section, Petitioners begin from the initial premise that: "The infliction of *severe corporal punishment* upon public school students absent notice of the charges for which punishment is to be inflicted and some opportunity to be heard, violates the due process clause of the Fourteenth Amendment." But, in a short time, the definition is offered in Petitioners' footnote 19 that everything save "a brief hand spanking or a slapped face" comes within the definition of severe corporal punishment — including "one lick with the paddle."

The Petitioners have mitigated their due process demands somewhat, backing off from the original three-judge panel decision of the Fifth Circuit and its labyrinth of procedural checkpoints. This seeming lessening of demand may simply be an accurate prediction on the Petitioners' part that they can accomplish their ultimate goal — the elimination of corporal punishment in all forms — with less than the original panel gave them. So the "minimal procedures required" by Petitioners' reasoning are: (1) notice of the charges and an opportunity to be heard and (2) a neutral person to decide the need for the punishment and impose it if necessary. The National Education Association in its Brief as amicus curiae in support of the Petitioners, p. 13, unabashedly closes their eyes to the surface

limitations of "severe" punishment and simply request full and procedural rules "whenever corporal punishment is to be administered."

The concern of amicus UTD is simply stated: That the Petitioners will accomplish indirectly that which they cannot accomplish directly. If their arguments regarding abolition of corporal punishment under Eighth Amendment standards are rejected by this Court, and they fall back upon the procedural due process aspects of the case, they may just effectuate that abolition for which the Court would have found no Constitutional justification.

In *Paul v. Davis*, __ U.S. __, 96 S.Ct. 1155 (1976), the plaintiff was faced with the same problem with which Petitioners must contend. The court felt that there was no showing of a specific Constitutional guarantee safeguarding the interest the plaintiff asserted was being invaded. Mr. Davis apparently believed:

> "that the Fourteenth Amendment's due process clause should ex proprio vigore extend to him a right to be free of injury wherever the state may be characterized as the tort feasor. But such a reading would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the states. We have noted the 'Constitutional shoals' that confront any attempt to derive from Congressional civil rights statutes a body of general federal tort law, *Griffin v. Breckenridge*, 403 U.S. 88, 101-102, 29 L.Ed.2d 338, 91 S.Ct. 1790 (1971); a fortiori the procedural guarantees of the due process clause cannot be the source for such law."

Since Petitioner's Brief was written after *Paul v. Davis* was rendered, there was the creation of a new element in the case — a Fourth Amendment protection of the person theory. This doctrine is newly aired to this Court and is in direct response to the Petitioners' difficulties following *Paul v. Davis*. Even if this newly risen concept were accepted by the Court, there is still the Court's instructions that "the scope of the remedy is determined by the nature and extent of the Constitutional violation." If that be so, then the finding by the trial court and the admission by the Petitioners that the entire Dade County school system was not involved in excessive use of corporal discipline and that the Drew Junior High School instances stood alone, shows that the remedy sought does not fit the nature and the extent of any potential Constitutional violation. The instance of abuse is the rare and dramatic example — the utilization of what the Florida Legislature has defined as corporal punishment, i.e., "the moderate use of physical force or physical contact by a teacher or principal as may be necessary to maintain discipline or to enforce school rules" is the less exciting stuff of which daily classroom discipline is made.

For example, amicus can trace its own involvement as a teachers' organization in the discipline field in Dade County schools for the last decade and it makes rather dull reading. In 1966 the wheels were set in motion for union participation on the Coordinating Committee for Discipline. This began in 1967 and the organization drew up guidelines for what the union termed "Organization for Discipline Improvement." That report has been renewed and updated and presented annually to the School Board until some small portions of it have finally emerged as facts of school life. One of the basic assumptions was that dis-

ruptive students did not belong in a regular school. There was a call for a lack of toleration within the classroom for rudeness, disrespect, physical violence, vandalism, lack of effort, truancy and tardiness. They pled for greater principal and teacher authority in administrating discipline and suggested an in-service program in discipline to be instituted by the School Board. The group gave birth to the forerunner of today's In-House Suspension Program and asked for special classrooms to be set up for students in need of help in developing more adequate self-concepts. They sought increased visiting teacher staff. The concept of centers for special instruction for consistently negative, disruptive students was evolved.

All this came out in 1967 and was pushed again and again before the proper bodies. New twists developed as the teachers learned more about the potentials of alternative behavior modification programs. One of the basic premises was that no consistently disruptive student who was sent into a rehabilitative educational program or a special center should be allowed to return to regular classrooms until a mandatory conference had been completed between the student's parents and the principal and teacher. Yearly explanations were sought of current corporal punishment standards and requests were made of the administration to show full support in the area of the classroom instructional personnel. Each year parents and interested citizens were invited to contribute ideas to the union for the improvement of discipline in the schools.

By 1969, the union had added to its requests the need for the establishment of student forums with teacher supervision to allow students legitimate methods to air grievances and discuss issues. In 1970, the union proposed a

School Discipline Code which included within it the concept that teachers had the right and duty to enforce obedience to orders and that teachers had the right to exclude disruptive students from their classrooms. If all in-house and special class attendance efforts failed, then the final measures of suspension or expulsion should be turned to.

In 1971, the union distributed information on the results of the current Gallup Poll which showed that Americans considered discipline to be the number one problem in the schools nationwide. Some 53% of those surveyed felt that school discipline was not strict enough. In an interesting sidelight, the same poll showed 23% of the high school students themselves believed that school discipline was lacking in strictness.

In each year's presentation, the union would stress the need to exclude the disruptive student from the regular classroom so that non-disruptive students could continue the learning process. The vast majority of disruptive students stayed in the regular classrooms and teachers were left to deal with them as best they could.

Correlative with the efforts to arouse the community for the need for a wider base of involvement in school discipline was a legislative lobbying effort on the union's part. The legislative positions pushed during that decade included the need for professional liability insurance for instructional personnel; a requirement for school boards to reimburse teachers for personal property loss due to vandalism or other illegal acts; a requirement that school boards purchase $100,000 life insurance for the protection of families of teachers who may lose their life in the per-

formance of their duty; and a revision of the state funding program to provide for centers for disruptive children who had been expelled. And, always, both to the Legislature and to the School Board, the union sought the reduction of class size so that there would be an opportunity for a controlled environment of learning.

By 1972, the union's efforts before local authorities and the State Legislature had begun to bear some fruit. At that time, the Executive Director of the union, Pat L. Tornillo, Jr., outlined the six basic reasons for the sharp increase in student disruptions: (1) increased class size; (2) lack of equipment and materials; (3) schools operating in isolation of the community; (4) parental laxity; (5) outside school distractions; and (6) lack of support on behalf of the Legislature, the public and school administration. Court cases began arising during this period of time in which parents and children sought monetary compensation for corporal punishment administered in the school. The fear of the teachers that there was little support for their consistent efforts to improve discipline and possible civil liability awaiting them should they follow through with their own efforts, was disheartening and discouraged independent disciplinary action.

In 1973, the union had the satisfaction of seeing the Dade County School Board vote to institute on-site school centers for in-house suspensions and by the end of the year, several such centers were actually operating. Then, in 1974, the three-judge panel decision of *Ingraham v. Wright* came down. Elaborate due process protections for students prior to the application of corporal punishment were dictated when the Florida Attorney General issued an Opinion stating that this was necessary under the Fifth Circuit's decision. One more alternative for discipline was virtually eliminated for the classroom teacher. But, the legislative efforts and the dedication to the improvement of discipline went on, even within those restrictions.

The decade was culminated with the passage in June of 1976 of the Students Responsibility/Discipline Bill. That act is set forth in pertinent part in the Respondent's Brief, 3-5. Besides establishing a state policy in favor of corporal punishment and excluding the possibility of individual districts prohibiting such disciplinary tool, the act sets out the following standards for when "*a teacher* feels that corporal punishment is necessary":

> (1) The use of corporal punishment shall be approved in principle by the principal before it is used, but approval is not necessary for each specific instance in which it is used.
>
> (2) A teacher or principal may administer corporal punishment only in the presence of another adult who is informed beforehand, and in the student's presence, of the reason for the punishment.
>
> (3) A teacher or principal who has administered punishment shall, upon request, provide the pupil's parent or guardian with a written explanation of the reason for the punishment and the name of the other teacher or principal who was present."

[*Florida Statutes* §232.27.]

This is the Bill that the teachers worked 10 years to achieve. They did it in cooperation with the School Board and other concerned institutions. The teachers were there fighting for it before anyone else simply because they are in the classroom and live the problem. Others have now joined the fight. Community efforts are underway at this time in Dade County to bring about school/community/inter-agency team approaches to school discipline. A basic realization that the school cannot solve the problem of disruptive youth all by itself is finally being accepted.

This brief history of the amicus union's involvement in school discipline in Dade County is offered not as a litany of self-satisfaction, but, rather, as a living example of the involvement and intimate dedication to detail that those who are in the classroom have already devoted to the situation and are continuing so to do. The inappropriateness of federal intervention in such an instance is clear.

> "Judicial interposition in the operation of the public school system of the nation raised problems requiring care and restraint . . . By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operations of school systems and which do not directly and sharply implicate basic Constitutional values."
>
> [*Epperson v. Arkansas*, 393 U.S. 77, 104 (1968).]

More recently this Court held in *Meachum v. Fano*, ____ U.S. ____, 96 S.Ct. 2532, 2538 (1976):

> "[H]old as we are urged to do that *any* substantial deprivation imposed by prison authorities triggers the procedural protections of the due process clause would subject to judicial review a wide spectrum of discretionary actions that traditionally have been the business of prison administrators rather than that of the federal courts."

The emphasis of Petitioners and in a way, Respondents' answers thereto, have focused, as so frequently must be the case, on the problem child rather than the good kid. Whether and when and how the disruptive child will be disciplined is a genuine concern. But amicus would pray that this Court focus its attention on the plight of the child who never becomes a statistic for a newspaper expose on school violence other than as a victim. This is the child that the public school system of this Nation was designed to serve. Amicus UTD and each of its members are devoted in professional and personal commitment to the concept that the child who enters the classroom to learn must be given a chance and the teacher who enters the classroom to teach that child, must similarly have the opportunity to offer his lessons in an atmosphere free of disorder. When there is no direct or sharp conflict with Constitutional values, as none has been demonstrated in the case at bar, then "the wisdom and experience of school authorities must be deemed superior and preferable to that of the federal judiciary." *Zeller v. Donegal School District Board*, 517 F.2d 600, 607 (3rd Cir. 1975) (*en banc*).

It is the classroom teacher that in the final analysis must make the learning process work. Teachers and school administrators have too often served as society's scapegoats. The second the learning process falters, the schools and the teachers are criticized. No profession other than the American teachers have ever been subjected to any vaguely comparable set of conflicting pressures and demands. Teachers are finally saying — hold on now! We became educators by choice and we've given our training and years of public service to raise tomorrow's citizenry. We cannot, however, assume the total responsibility of each generation while being given fewer and fewer tools to deal with a more and more explosive situation.

Surely it is clear that amicus is not seeking to disregard the rights of its young charges. The discipline bill that amicus union was so instrumental in getting passed by the Legislature has within it numerous protections and procedural standards for the application of all forms of discipline, including corporal punishment. The question to this Court is whether Petitioner has met its burden to prove the deprivation of a Constitutional right of a magnitude sufficient to bring federal Constitutional due process protections into play. The state protections are there. The teachers helped to get them. However, amicus believes that the Court of Appeals for the Fifth Circuit was correct in its decision that no liberty or property interest is implicated by the use of corporal punishment as a school disciplinary measure.

CONCLUSION

As the increase of discipline problems in the schools threatens to disrupt the educational program and deny the majority of students the right to learn and the teachers the right to teach, amicus UNITED TEACHERS OF DADE joins with the Respondent, DADE COUNTY SCHOOL BOARD in a firm, compatible stand in favor of allowing local and state flexibility in choice of disciplinary methodology, including within that range of choice, the use of corporal punishment as defined by the Florida Legislature. The *en banc* decision of the Court of Appeals for the Fifth Circuit has thoughtfully and comprehensively examined Petitioners' arguments regarding prohibition of corporal punishment by the Eighth Amendment and the necessity for federal due process procedures under the Fourteenth Amendment. The *en banc* Court found Petitioners' position wanting and that decision should be affirmed.

Respectfully submitted,

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